

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION, AKRON

ESTATE OF CARLA MYERS, et. al))	CASE NO. 5:00 CV 1759
)	
Plaintiffs,)	JUDGE GWIN
)	
v.)	
)	PLAINTIFF'S REPLY IN
CNA FINANCIAL CORPORATION)	SUPPORT OF THEIR MOTION
)	FOR RECONSIDERATION
Defendant)	

This Court's January 23, 2001 order was an interlocutory order and not a final order. Therefore under Rule 54(b) of the Federal Rules of Civil Procedure, the order is subject to revision at any time before a final judgment is entered. Moody v. Kapica, 548 F.2d 133 (6th Cir.1976) (*per curiam*). In Consolidation Coal Co. v. U.S. Dept. of Interior, 43 F.Supp.2d 857, (S.D.Ohio 1999) the Court held:

"It is black-letter law that '[u]ntil final decree the court always retains jurisdiction to modify or rescind a prior interlocutory order.' *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1121 (10th Cir.), *cert. denied* 444 U.S. 856, 100 S.Ct. 116,

62 L.Ed.2d 75 (1979).

In the Plaintiffs' Motion for Reconsideration, the Plaintiffs argued that the holding of the Ohio Supreme Court in Scott-Pontzer v. Liberty Mutual Fire Ins. Co. (1999), 85 Ohio St.3d 606 was directly on point and that the distinction made by this Court in its January 23, 2001 opinion was factually incorrect. In support the Plaintiff submitted the Court of Appeals decision and the actual policy at issue in the Scott-Pontzer case as identified by the Appellant's counsel in that case. Defendant's response makes reference to the Plaintiffs' reliance on "a reversed appellate decision and one party's brief filed in the Ohio Supreme Court."

Since, the Defendant questions the facts set forth in the Appellate Court decision and the affidavit of counsel in that case, the Plaintiffs have attached as Exhibit A to this Reply the brief of the Appellees, Liberty Mutual Insurance Company filed in the Scott-Pontzer case. The Liberty Mutual Insurance Company Brief before the Ohio Supreme Court shows that Liberty Mutual presented a "PROPOSITION OF LAW NO. 3" entitled:

"ONE WHO IS NOT AN INSURED CANNOT RECOVER UNDERINSURED MOTORISTS BENEFITS UNDER AN UMBRELLA/EXCESS POLICY OF INSURANCE." (Brief at page 11)

On pages 12-13 of their brief Liberty Mutual argued:

"Appendix Exhibit 'J', WHO IS AN INSURED, Part 2 a., includes employees of Superior as insureds "but only for acts within the scope of their employment by 'you'. The party's Stipulation no. 5 states:

"5. At the time of the accident, Mr. Pontzer was **not within the course and scope of his employment with Superior Dairy, Inc.** (emphasis added).

"Pursuant to this Stipulation, Christopher Pontzer would not qualify as an insured as an employee of Superior."

Thus, the Ohio Supreme Court in Scott-Pontzer v. Liberty Mutual Fire Ins. Co. (1999), 85 Ohio St.3d 606 was expressly presented with the same arguments made before this Court and those arguments were rejected. The decision on this point was not dicta, but a required holding based upon the facts in that case which are indistinguishable from the facts in this case. For the foregoing reasons, the motion for reconsideration should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2001, a copy of the foregoing Motion for Summary Judgment was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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